

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 7, 2004 Session

IN THE MATTER OF: D.A.E., ET AL.

**Appeal from the Juvenile Court for Jefferson County
No. 4843 Benjamin Strand, Jr., Judge**

No. E2002-02836-COA-R3-PT - FILED AUGUST 30, 2004

The trial court terminated the parental rights of T.E.T. (“Mother”) with respect to her five minor children, D.A.E. (DOB: June 13, 1992), J.H.E. (DOB: June 5, 1994), D.H.E. (DOB: June 13, 1995), J.E. (DOB: June 30, 1996), and D.E. (DOB: January 15, 1998). Mother appeals, arguing that the evidence preponderates against the trial court’s finding – which the court made by clear and convincing evidence – that Mother failed to substantially comply with the requirements of the permanency plan. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John B. Bunnell, Newport, Tennessee, for the appellant, T.E.T.

Paul G. Summers, Attorney General and Reporter, and Douglas Earl Dimond, Assistant Attorney General, for the appellee, State of Tennessee Department of Children’s Services.

OPINION

I.

On March 26, 1999, the Department of Children’s Services (“DCS”) filed a petition for temporary custody of D.A.E., J.H.E., D.H.E., J.E., and D.E. (collectively “the children”). The petition avers, among other things, that “these five children under the age of six were found to be living in filthy and unsanitary conditions.” In addition, the petition alleges that the youngest child, who was then 14 months old, “has cystic fibrosis; however, Mother regularly smokes around the child.” When the petition was filed, the juvenile court entered an order placing temporary custody of the children with DCS.

On July 27, 2001, DCS filed a petition to terminate Mother's parental rights. The case was heard over four days in February, March, and May, 2002. On October 29, 2002, the trial court entered its order, finding, by clear and convincing evidence, that grounds for terminating Mother's parental rights existed and that termination was in the best interest of the children.¹ Specifically, the court made the following findings:

That [Mother] has abandoned the [children], in that [Mother] has willfully failed to support or make reasonable payments toward the support of the children for four (4) consecutive months immediately preceding the filing of this petition;

That the children have been removed by order of this Court for a period of six (6) months; the conditions which led to their removal still persist; other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of [Mother]; there is little likelihood that these conditions will be remedied at an early date so that these children can be returned to [Mother] in the near future; the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home;

That [Mother] has failed to comply in a substantial manner with those reasonable responsibilities set out in the foster care plans related to remedying the conditions which necessitate foster care placement;

* * *

That [DCS] has made reasonable efforts to find a permanent and appropriate placement for the minor children and toward preventing the children from continuing in foster care unnecessarily. . . .

From this order, Mother appeals.

II.

Our review of this non-jury case is *de novo*; however, that review is on the record of the proceedings below and the record comes to us accompanied by a presumption of correctness as to

¹Petitions to terminate the parental rights of V.P.M., father of D.E.; A.M., father of D.A.E., J.H.E., and D.H.E.; and M.R., father of J.E., were filed on July 27, 2001, and default judgments were entered against all three men on December 12, 2002, terminating their respective parental rights to the children. None of the three fathers are parties to this appeal.

the trial court's factual findings, a presumption that we must honor unless the evidence preponderates against the trial court's factual findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court's conclusions of law. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

In Tennessee, the law is well-established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

Tenn. Code Ann. § 36-1-113(g) lists the grounds upon which parental rights may be terminated, and "the existence of any one of the statutory bases will support a termination of parental rights." *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). The issues raised in the pleadings, and the trial court's findings, cause us to focus on the following statutory provisions:

Tenn. Code Ann. § 37-1-147 (2001)

(a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.

* * *

Tenn. Code Ann. § 36-1-113 (Supp. 2003)

(a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

* * *

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in [Tenn. Code Ann.] § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

* * *

Tenn. Code Ann. § 36-1-102 (Supp. 2003)

As used in this part, unless the context otherwise requires:

(1)(A) “Abandonment” means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child’s situation prevented reasonable efforts from being made prior to the child’s removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

* * *

(D) For purposes of this subdivision (1), “willfully failed to support” or “willfully failed to make reasonable payments toward such child’s support” means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child;

* * *

Tenn. Code Ann. § 37-2-403 (Supp. 2003)

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care. . . .

* * *

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. . . .

* * *

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights,

IV.

Mother raises only one issue for our consideration: whether the trial court erred in finding that Mother had not substantially complied with the requirements of the permanency plan. We find this issue adverse to Mother.

The permanency plan, dated June 8, 2000, required Mother to do the following: (1) maintain a safe and stable home; (2) demonstrate an ability to meet the needs of the children on an ongoing basis; (3) participate in parenting classes to learn appropriate parenting skills; (4) demonstrate that she is able and willing to appropriately supervise the children at all times; (5) cooperate with DCS and follow its recommendations or requests; and (6) participate in and complete a psychological evaluation. In addition, the trial court added to the plan the requirement that Mother not smoke around the children.

While our review of the record indicates that Mother obtained a psychological evaluation, improved – to some degree – the conditions of her home, and completed parenting classes, she failed to substantially comply with the other requirements under the plan, which are arguably the most important, as they relate to the ability to properly care for children. The trial court, in its memorandum opinion, noted that Mother has demonstrated “a lack of discipline” and an “indifference toward completing the Permanency Plan.” In addition, the trial court stated that it believed Mother had merely attended the required parenting and counseling sessions, rather than participating in them. “In the Court’s opinion to have the children returned to her she must have been an active participant to learn how to change her conduct so that she would be capable of having the children returned to her.”

The trial court made it very clear that Mother had not demonstrated an ability to properly care for and supervise the children, as required under the permanency plan. Furthermore, Mother

admitted at trial that she continued to smoke in the presence of the children, in spite of the trial court's explicit instruction that Mother refrain from smoking. Based upon this evidence, the trial court found, by clear and convincing evidence, that Mother had not substantially complied with the requirements of the permanency plan, and we cannot say that the evidence preponderates against this finding.

Although Mother has not raised an issue on appeal with respect to the trial court's findings of abandonment and the failure to remedy persistent conditions, our review of the record persuades us that the evidence does not preponderate against the trial court's findings, again by clear and convincing evidence, of the existence of these two other grounds for terminating Mother's parental rights.

V.

The judgment of the juvenile court is affirmed. This case is remanded to the juvenile court for enforcement of that court's judgement and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, T.E.T.

CHARLES D. SUSANO, JR., JUDGE